SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-247
District Docket Nos. XIV-2014-0214E
and XIV-2014-0324E

IN THE MATTER OF

JOSEPH S. CHIZIK

AN ATTORNEY AT LAW

Decision

Decided: May 4, 2016

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The two-count complaint charged respondent with violations of RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep the client reasonably informed about the status of the case and to comply with the client's reasonable requests for information), RPC 1.16(d) (failure to return client property upon termination of the representation), RPC 8.1(b) and R. 1:20-3(g)(3) (failure to cooperate with disciplinary

authorities), RPC 8.4(b) (commission of a criminal act), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) and R. 1:20-20 (conduct prejudicial to the administration of justice). We determine to impose a two-year suspension.

Respondent was admitted to the New Jersey bar in 1976. On June 23, 1988, he received a private reprimand (now an admonition) for lack of diligence and failure to communicate with the client. In the Matter of Joseph S. Chizik, DRB 86-045 (June 23, 1988).

On May 27, 1997, he received a reprimand for lack of diligence and failure to communicate with a client. In re Chizik, 149 N.J. 377 (1997).

On March 7, 2013, respondent received a second reprimand, this time for gross neglect, lack of diligence, failure to communicate with the client, failure to return the file upon termination of the representation, and failure to cooperate with an ethics investigation. In re Chizik, 213 N.J. 81 (2013).

Finally, on February 14, 2014, respondent was suspended for three months, on a certified record, for lack of diligence, failure to communicate with clients, failure to provide a written fee agreement, and failure to cooperate with ethics

authorities in two client matters. <u>In re Chizik</u>, 216 <u>N.J.</u> 399 (2014). Respondent remains suspended to date.

Service of process was proper in this matter. On April 23, 2015, the OAE sent a copy of the complaint, by both certified and regular mail, to counsel for respondent, James J. Gerrow, Jr., at Gerrow's office address, as listed in the attorney registration records. The certified mail return receipt, indicating delivery on April 27, 2015, bore the signature "Laura Milleron." The regular mail was not returned.

The OAE also sent a copy of the complaint to respondent's home address on April 23, 2015. The certified mail return receipt, indicating delivery on April 27, 2015, was signed by respondent. The regular mail was not returned.

On May 29, 2015, the OAE sent a "five-day" letter to respondent's counsel, by certified and regular mail, notifying him that, unless respondent filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record in the matter would be certified directly to us for imposition of a sanction, and the letter would serve as an amendment to the complaint to charge respondent with a willful violation of <u>RPC</u> 8.1(b) for his failure to answer. The certified mail receipt

card was returned, having been signed on June 1, 2015 by "Laura Milleron." The regular mail was not returned.

The OAE also sent a copy of the five-day letter to respondent's home address, by certified and regular mail. The certified mail to respondent's home address was sent out for delivery by the United States Postal Service on June 3, 2015, but "there has been no update since that time as to its status." The regular mail to the home address was not returned.

As of July 13, 2015, the date of the certification of the record, respondent had not filed an answer.

I. <u>District Docket No. XIV-2014-0214E – R. 1:20-20</u>

As previously noted, respondent was suspended from the practice of law for three months, effective February 14, 2014. On July 14, 2014, his Pennsylvania law license was suspended for three months as well.

Respondent has not applied for reinstatement in New Jersey and remains suspended to date.

Pursuant to the New Jersey suspension order, respondent was required to comply with <u>R.</u> 1:20-20, governing suspended attorneys. That <u>Rule</u> requires an attorney to file with the OAE Director, within thirty days after the date of the order of suspension, a detailed affidavit specifying how the disciplined

attorney has complied with each of the provisions of the <u>Rule</u> and the Court's Order.

Respondent failed to file the <u>R.</u> 1:20-20 affidavit within the time prescribed. Therefore, on July 3, 2014, the OAE sent a letter to Gerrow, respondent's counsel, about the missing affidavit, requesting a reply by July 17, 2014. Neither Gerrow nor respondent replied.

Thereafter, on March 3, 2015, OAE personnel confirmed with Gerrow that he still represented respondent. The OAE advised Gerrow that, if respondent did not file an affidavit immediately, a complaint would be filed against respondent for failure to comply with <u>R.</u> 1:20-20. Nevertheless, a compliance affidavit was never filed. The complaint alleged that respondent's failure to file the compliance affidavit violated <u>RPC</u> 8.1(b), <u>RPC</u> 8.4(d) and <u>R.</u> 1:20-20.

II. <u>District Docket No. XIV-2014-0324E - The O'Yang Matter</u>

On May 25, 2014, James O'Yang filed a grievance alleging that he had retained respondent and paid a fee for a bankruptcy and other matters, but that respondent "did nothing." O'Yang had paid respondent's $4,500 fee in a series of installments from July 2012 to July 2013.

By letters dated July 14 and August 4, 2014, the OAE sent requests for information to respondent at his home address, but he had apparently moved. The certified mail return receipt for the August 4, 2014 mailing was returned, signed by respondent, with a California address.

On February 10, 2015, the OAE sent a third letter-request for information to respondent, this time at the California address, by certified and regular mail. Once again, respondent accepted the certified mail, signed the receipt, and failed to contact the OAE or to provide the requested information. The regular mailing was not returned.

As previously stated, on March 3, 2015, OAE personnel spoke with Gerrow, who confirmed that he represented respondent. On March 4, 2015, the OAE sent Gerrow a request for information about the O'Yang matter, to be received no later than March 20, 2015. Neither respondent nor Gerrow replied to that request. Therefore, on March 24, 2015, the OAE notified Gerrow that, unless a reply was received by March 27, 2015, a complaint would be filed against respondent. The OAE received no reply to this final correspondence.[1]

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[1] R. 1:20-7(h) provides that service on a respondent may "be made by serving respondent's counsel, if any, by regular mail or by facsimile transfer."

The complaint alleged that, on August 6, 2013, respondent filed a Chapter 7 petition for O'Yang. The next day, the bankruptcy court sent to both respondent and O'Yang a "Notice of Missing Documents and Notice of Dismissal If Documents Are Not Timely Filed." The notice cautioned that if the debtor did not reply within fourteen days of the petition date, the matter would be dismissed.

Respondent filed nothing further in O'Yang's bankruptcy and, on August 26, 2013, the case was dismissed. The order of dismissal was sent to both O'Yang and respondent. On January 6, 2014, the bankruptcy court released the trustee and closed the case by final decree.

Respondent never informed O'Yang that his case had been dismissed in August 2013 and closed in January 2014. To the contrary, on March 7, 2014, respondent requested an additional $500 "for his bankruptcy case," which O'Yang paid, "despite the case [having been] closed two months prior."[2] According to the complaint, respondent took no further action to revive the

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[2] Respondent's fee request post-dated his February 14, 2014 suspension. If that fee request pertained to future legal work, as opposed to collection of fees earned prior to the suspension, respondent's fee solicitation may have violated <u>RPC</u> 5.5(a) (practicing while suspended). The complaint, however, made no such charge. Thus, we are precluded from making such a finding, as <u>R.</u> 1:20-4(b) requires the complaint to set forth the specific ethics rule alleged to have been violated.

matter and never updated his client about the true status of the case. Respondent neither replied to O'Yang's ethics grievance nor turned over to the OAE files and banking records that had been requested of him.

The complaint alleged that, in the O'Yang matter, respondent: (1) lacked diligence in the representation (RPC 1.3); (2) failed to keep his client reasonably informed about the case (RPC 1.4(b)); (3) upon termination of the representation, failed to take steps to the extent reasonably necessary to protect O'Yang's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned or incurred (RPC 1.16(d)); (4) failed to cooperate with the OAE's investigation of the O'Yang grievance (RPC 8.1(b) and R. 1:20-3(g)(3)); (5) committed a criminal act by improperly obtaining funds from his client for a closed case, which reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects (RPC 8.4(b)); and (6) engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)).

* * *

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

In respect of the R. 1:20-20 charge, despite respondent's obligation to file an affidavit in full compliance with the rule, he failed to do so. Under R. 1:20-20(c), failure to file the required affidavit within the prescribed time is a violation of RPC 8.1(b) and RPC 8.4(d).

In addition, respondent was retained by O'Yang to file a Chapter 7 bankruptcy petition, for which he paid respondent $4,500. It is not clear, and the record is silent, as to whether this amount represented respondent's full fee and filing costs, or whether it represented only a partial payment. Although respondent filed a petition on August 6, 2013, it was deficient.

Under the bankruptcy rules, the deficiencies were required to be corrected within fourteen days. As a result of respondent's failure to comply with the deficiency notice, the case was dismissed on August 26, 2013, and closed on January 6, 2014. In the interim, respondent took no action other than to request and receive another $500 from his client. By failing to

advance the bankruptcy petition, respondent violated RPC 1.3. In addition, he failed to keep his client informed about events in the case, including his failure to cure the identified deficiencies, the dismissal of the case, and the entry of the final decree. Respondent's failure to communicate in this respect violated RPC 1.4(b).

The complaint was conclusory in its charge that respondent violated RPC 1.16(d), reciting no facts to support that charge. In fact, the complaint contains no information about the circumstances of the termination of the representation. Although, presumably, the representation ended with respondent's February 14, 2014 suspension, the complaint fails to provide any such details. Similarly, the complaint does not allege facts indicating that a portion of the fee was unearned, that respondent failed to return that portion of the fee, or that respondent failed to surrender any other property belonging to O'Yang. Thus, in light of the absence of any facts to support the RPC 1.16(d) charge, we dismissed it for lack of clear and convincing evidence.

Respondent failed to heed at least three written OAE requests for information in the O'Yang matter. Respondent's failure to cooperate with the ethics investigation in this regard violated RPC 8.1(b).

We also find a violation of RPC 8.4(c) for respondent's misrepresentation by silence. Specifically, respondent failed to advise his client that the bankruptcy petition had been dismissed in August 2013 and closed in January 2014.

The complaint also alleged that respondent committed a criminal act by requesting from O'Yang an additional $500 fee "for his bankruptcy case," on March 7, 2014, seven months after the bankruptcy case had been dismissed. Yet, by March 2014, both respondent and O'Yang had been notified by the bankruptcy court that the petition was dismissed and that, by final decree, the case was closed. It is puzzling that, with that knowledge, O'Yang would give respondent additional funds for the failed and closed bankruptcy representation.

Unfortunately, the complaint sheds little light on this issue. The complaint does not allege that O'Yang already had paid respondent's fee in full or that he had paid the filing fee for the bankruptcy petition. It is possible that the $500 fee that respondent requested after the bankruptcy petition had been dismissed was due and owing. Thus, we find that the complaint does not allege sufficient facts to support a violation of RPC 8.4(b). We, therefore, dismissed that charge.

In sum, respondent violated RPC 1.3, RPC 1.4(b), RPC 8.1(b), RPC 8.4(c) and RPC 8.4(d). The only issue remaining is the appropriate discipline for respondent's misconduct.

In default matters, a reprimand is generally imposed for lack of diligence and failure to cooperate with disciplinary authorities, even if this conduct is accompanied by other, non-serious ethics infractions. See, e.g., In re Brandmayr, 220 N.J. 34 (2014) (attorney failed to act with diligence and failed to communicate with his client; prior reprimand); In re Rak, 203 N.J. 381 (2010) (attorney guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with the investigation of the grievance); and In re Swidler, 192 N.J. 80 (2007) (attorney grossly neglected one matter and failed to cooperate with the investigation of an ethics grievance).

Misrepresentation to clients generally requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Ruffolo, 220 N.J. 353 (2015) (attorney exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, not working on it after filing the initial claim, and failing to take any steps to

prevent its dismissal or ensure its reinstatement thereafter, violations of RPC 1.1(a) and RPC 1.3; the attorney also violated RPC 1.4(b) by failing to promptly reply to the client's requests for status updates; finally, his assurances that the client's matter was proceeding apace, knowing that the complaint had been dismissed, and that he should expect a monetary award in the near future were false, thereby violating RPC 8.4(c)); In re Braverman, 220 N.J. 25 (2014) (attorney failed to tell his client that the complaints filed on her behalf in two personal injury actions had been dismissed, thereby misleading her, by his silence, into believing that both cases remained pending, a violation of RPC 8.4(c); the attorney also violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b); we found that the attorney's unblemished thirty-four years at the bar were outweighed by his inaction, which left the client with no legal recourse); and In re Winston, 219 N.J. 426 (2014) (attorney's failure to file a brief resulted in the dismissal of the client's appeal; violations of RPC 1.1(a) and RPC 1.3; the attorney failed to notify his client of the expiration of the deadline for filing the brief and to keep him informed about the status of the matter, a violation of RPC 1.4(b); instead, the attorney misrepresented to the client that the brief had been timely filed and that the appeal was proceeding apace, a

timely filed and that the appeal was proceeding apace, a violation of RPC 8.4(c); compelling mitigation).

Likewise, the threshold measure of discipline to be imposed for an attorney's failure to file a R. 1:20-20 affidavit is a reprimand. In re Girdler, 179 N.J. 227 (2004); In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003) (slip op. at 6). The actual discipline imposed may be different, if the record demonstrates mitigating or aggravating circumstances. Ibid. Examples of aggravating factors include the attorney's failure to respond to the OAE's specific request that the affidavit be filed, the attorney's failure to answer the complaint, and the existence of a disciplinary history. Ibid.

Since Girdler, the discipline imposed on attorneys who have failed to comply with R. 1:20-20 has ranged from a censure to a two-year suspension. See, e.g., In re Kinnard, 220 N.J. 488 (2015) (in a default matter, censure imposed on attorney who ignored the OAE's specific request that he comply with R. 1:20-20; prior admonition and temporary suspension); In re Terrell, 214 N.J. 44 (2013) (in a default matter, censure imposed on attorney who failed to file the required R. 1:20-20 affidavit, following a temporary suspension; no history of final discipline); In re Fox, 210 N.J. 255 (2012) (censure in a

default matter for an attorney who failed to file the R. 1:20-20 affidavit after a temporary suspension; no history of final discipline); In re Swidler, 210 N.J. 612 (2012) (three-month suspension for attorney who failed to comply with R. 1:20-20 after two suspensions, even after the OAE requested him to do so; it was the attorney's fourth default, his prior three defaults resulted in a reprimand, a three-month suspension, and a six-month suspension); In re Garcia, 205 N.J. 314 (2011) (three-month suspension for attorney's failure to comply with the OAE's specific request that she file the affidavit; her disciplinary history consisted of a fifteen-month suspension); In re Battaglia, 182 N.J. 590 (2006) (three-month suspension imposed in a non-default matter; the suspension was made retroactive to the date that the attorney filed the affidavit of compliance; the attorney's ethics history included two concurrent three-month suspensions and a temporary suspension); In re Rosanelli, 208 N.J. 359 (2011) (six-month suspension for attorney who failed to comply with R. 1:20-20 after a temporary suspension in 2009 and after a three-month suspension in 2010; the attorney had also received a six-month suspension in 2003); In re Sharma, 203 N.J. 428 (2010) (six-month suspension for attorney whose ethics history included a censure for misconduct in two default matters and a three-month suspension; the

attorney failed to comply with the OAE's request that he file the affidavit and repeatedly failed to cooperate with disciplinary authorities); In re McClure, 182 N.J. 312 (2005) (one-year suspension for attorney whose disciplinary history consisted of an admonition and two concurrent six-month suspensions, one of which was a default; the attorney failed to abide by his promise to the OAE to complete the affidavit; the Board noted the need for progressive discipline); In re King, 181 N.J. 349 (2004) (in a default, one-year suspension imposed on attorney with an extensive ethics history consisting of a reprimand, a temporary suspension for failure to return an unearned retainer, a three-month suspension in a default matter, and a one-year suspension; in two of the matters, the attorney ignored the OAE's attempts to have her file an affidavit of compliance; she remained suspended since 1998, the date of her temporary suspension); and In re Brekus, 208 N.J. 341 (2011) (in a default, two-year suspension imposed on attorney with significant ethics history: a 2000 admonition, a 2006 reprimand, a 2009 one-year suspension, a 2009 censure, and a 2010 one-year suspension, also by default).

Here, all three aggravating factors are present. Respondent ignored the OAE's specific requests that he comply with R. 1:20-20, failed to answer the complaint, and has a

serious ethics history: a 1988 private reprimand (now an admonition) for lack of diligence and failure to communicate with the client; a 1997 reprimand for lack of diligence and failure to communicate with clients; a 2013 reprimand for gross neglect, lack of diligence, failure to communicate with the client, failure to return the client file, and failure to cooperate with an ethics investigation; and a 2014 three-month suspension, in a default, for misconduct in two matters: lack of diligence, failure to communicate with clients, failure to provide a written fee agreement, and failure to cooperate with ethics authorities.

In further aggravation, O'Yang paid respondent at least $4,500 for a Chapter 7 bankruptcy, but received only the swift dismissal of a woefully deficient petition. Thereafter, respondent took no action on his client's behalf.

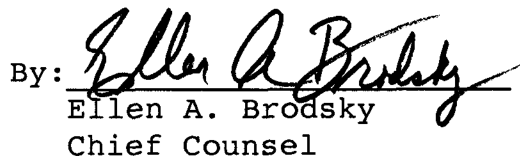
In addition, respondent appears to have learned nothing from his numerous, prior mistakes, having engaged in the same sort of misconduct in the O'Yang matter as he had in his prior discipline matters. The principle of progressive discipline calls for an enhanced sanction. Because respondent's most recent discipline for similar violations was a three-month suspension, a six-month suspension would be warranted here, if not for the presence of other aggravating factors.

Specifically, after respondent defaulted in his three-month suspension matter, he completely disregarded the Court's Order by failing to comply with R. 1:20-20, despite generous efforts by the OAE to coax him into compliance. An attorney's failure to comply with the Court's Order in this respect has very real consequences for the disciplined attorney's clients and for the court system. Clients who do not receive proper notification are often left in the dark about the status of their matters. Sometimes those matters are the subject of pending litigation. In those cases, the potential for disruption is even more pervasive, extending not only to the unsuspecting client, but also to the other parties to the litigation, to the court, and to court personnel. In our view, respondent's failure to appreciate the potential consequences of his failure in this regard demonstrates a complete disdain for the discipline system, and, in the context of the default status of this matter, along with respondent's substantial disciplinary history, and the harm suffered by his client, mandates enhanced discipline. Thus, we determine to suspend respondent for two years, the same discipline imposed in Brekus.

Chair Frost and Member Clark voted for a one-year suspension. Vice-Chair Baugh and Members Hoberman and Singer did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

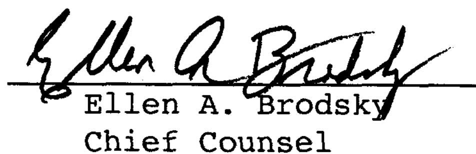
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph S. Chizik
Docket No. DRB 15-247

Decided: May 4, 2016

Disposition: Two-year suspension

Members	Disbar	Two-year Suspension	One-year Suspension	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli		X				
Hoberman						X
Rivera		X				
Singer						X
Zmirich		X				
Total:		3	2			3



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